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409444—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

STATEMENT

Petitioner filed this suit in 1949 under Sections 4 and 16 of the Clayton Act, 15 U. S. C. 15, 26, seeking recovery of treble the damages he had sustained by reason of respondents' violation of the antitrust laws and injunctive relief against further violation. The defendants, respondents here, were the National Football League (National League), its then ten member clubs, and two individuals. Since the district court dismissed the complaint for failure to state a cause of action and the court below affirmed, the allegations of the complaint must be taken as true. The allegations pertinent to the issues before this Court are summarized below.

Continuously since about 1938 the defendants have been conspiring to monopolize, attempting to monopolize, and monopolizing commerce among the states in the business of professional football, and have been conspiring to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States", in violation of Sections 1 and 2 of the Sherman Act (R. 9). This monopoly and conspiracy has consisted in part of agreements to boycott and, if possible, ruin the All America Conference, organized as a rival to the National League, so that the business of organized football would remain a monopoly of the National League (R. 14).

The teams of the various National League members play each other in various metropolitan centers, including New York, Chicago, Philadelphia, and Los Angeles (R. 7). Prior to the opening of each season the defendants make contracts by which they sell for large sums of money the right to broadcast and televise their games across state lines (R. 8). Without the money so received "the business of operating a professional football club would not be profitable", and the broadcasting and televising contracts are "part of the business of professional football itself" (*ibid.*).

By agreement, each National League member uses the uniform player contract published by the National League. This contract contains a reserve clause by which the player binds himself not to play for any other club without its consent (R. 10). The defendants further agree that no member club will hire a player who has violated the reserve clause (*ibid.*).

Petitioner began his professional football career in 1938. He played for the Detroit Lions, a National League club, for the 1938, 1939, 1940, and 1941 seasons and, following three years' service in the Navy, for the 1945 season (R. 10–11). After the Detroit Lions had refused petitioner's request that he be traded to a National League club located at Los Angeles, he played during the 1946 and 1947 seasons for a Los Angeles team of the All America Conference (R. 12–14). An affiliated member of the National League wished to employ petitioner for the 1948 season, but failed to do so when the National League advised it that petitioner was blacklisted and that, if he were hired, severe penalties would be imposed against the club (R. 14–15). This blacklist, ban, and boycott remained in effect up to the time of the filing of the complaint (R. 15).

The defendants, by reason of their violations of the antitrust laws "have injured the business of plaintiff by actively eliminating him from the business of organized football", and the amount of this injury is $35,000 (R. 16).

The district court granted the defendants' motion to dismiss the complaint following the decision in *Toolson* v. *New York Yankees,* 346 U. S. 356 (R. 62–64). The court of appeals affirmed the dismissal upon the ground that the case was governed by *Toolson* and its parent, *Federal Baseball Club* v. *National League,* 259 U. S. 200, rather than by *United States* v. *International Boxing Club,* 348 U. S. 236. The court reasoned that football, being a "team sport," was more like baseball than boxing (R. 75–

76). The court also held that the complaint did not state a cause of action because it did not allege facts from which it could be determined as a matter of law that the defendants' conduct "was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (R. 76–77).

THE GOVERNMENT'S INTEREST IN THE QUESTIONS PRESENTED

This Court's determination of the question whether the Sherman Act applies to a business involving promotion of team contests will settle this issue as to both Government and private suits brought under the Act, and is of obvious concern to the United States. The Government also has an interest in the question whether a private litigant, asserting injury caused by violation of the antitrust laws, is required to show also that the violation was calculated to prejudice the public interest. The ruling below is general in its application and, if upheld, will militate against the effectiveness of private triple damage and injunctive suits based on violation of the antitrust laws. Such suits were authorized by Congress as a means of deterring illegal restraints and monopolizations of trade, and they are an important supplemental aid to direct enforcement proceedings by the Government in bringing about obedience to the commands of the statute.

ARGUMENT

I

THE COURT BELOW ERRED IN INTERPRETING *FEDERAL BASEBALL CLUB* V. *NATIONAL LEAGUE*, 259 U. S. 200, AND *TOOLSON* V. *NEW YORK YANKEES*, 346 U. S. 356, AS REQUIRING THE HOLDING THAT THE BUSINESS OF PROFESSIONAL FOOTBALL, NO MATTER HOW INTERSTATE ITS CHARACTER, IS NOT SUBJECT TO THE SHERMAN ACT

The Government submits that the court below erred in dismissing the complaint upon the authority of the *Federal Baseball* and *Toolson* decisions. In 1922 this Court held in *Federal Baseball* that the business of baseball, as it was then conducted and as described in the record in that case, was not subject to the Sherman Act. The Court reasoned that the business consisted of giving a series of local exhibitions, that this activity is not interstate "trade or commerce" within the meaning of the Sherman Act, and that the transportation of persons across State lines was "a mere incident" to these local exhibitions. 259 U. S. 200, 208–209.

The scope and effect of this decision were considered by the Court in 1953 in *Toolson*. The holding was that, without re-examination of "the underlying issues", the Court would adhere to the *Federal Baseball* case "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws" (346 U. S. at 357). The reasons stated for applying the rule

of *stare decisis* were that the business of organized professional baseball had been left to develop for 30 years on the understanding that it was not subject to existing antitrust legislation, and that Congress had had the *Federal Baseball* ruling under consideration but had not seen fit to enact legislation to subject this business to the antitrust laws.

Two decisions by this Court at the following term clarified the *Toolson* ruling. *United States* v. *Shubert*, 348 U. S. 222, held that the business of providing theatrical exhibitions on a multistate basis constitutes interstate "trade or commerce" within the scope of the Sherman Act. The Court held that "*Toolson* was a narrow application of the rule of *stare decisis*" based upon "a unique combination of circumstances," and refused to "convert this narrow application of the rule into a sweeping grant of immunity to every business based on the live presentation of local exhibitions, regardless of how extensive its interstate phases may be." 348 U. S. 229–230.

United States v. *International Boxing Club*, 348 U. S. 236, held that the business of promoting professional championship boxing contests is within the reach of the Sherman Act. The Court declared that the case presented none of the factors underlying the *Toolson* decision. No court had ever held that the boxing business is not subject to the antitrust laws, and *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, had "clearly established that *Federal Baseball* could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise." The *International Boxing* de-

fendants therefore could not bring themselves under the wings of *stare decisis*.

The same considerations apply to the business of football. None of the unique *stare decisis* considerations found applicable to baseball in *Toolson* exists as to football. Like the boxing business, a holding that the business of football is exempt from the statute would be, not to continue an exemption previously judicially determined, but to create a new exemption. If those engaged in football or other professional sports enterprises wish relief of this kind, they must, the Court has said, resort to Congress, which has considered but not enacted bills providing for such relief. See 348 U. S. 242–244.

Notwithstanding that the *Toolson* ruling is plainly confined to that with which it alone dealt, the baseball business, the court below concluded in the instant case that the football business is within the ambit of *Toolson* because football, like baseball, is a team sport. Neither the language nor the reasoning of the *International Boxing* opinion warrants this conclusion. Although the case held that the boxing business is subject to the Act although baseball (by virtue of *stare decisis*) is not, the Court did not differentiate the two upon the ground that one business involved promoting individual contests and the other team contests. Indeed, Mr. Justice Frankfurter in his dissent in *International Boxing* asserted that, with respect to the criteria relevant to the applicability of the Sherman Act, there is not "a single differentiating factor between other sporting exhibitions, whether boxing or *football* or tennis, and baseball" (348 U. S. 248, emphasis added).

The present respondents in their brief opposing certiorari urged that, because the reserve clause of their player contracts is similar to the reserve clause of the baseball clubs' player contracts, the business of professional football is sufficiently like that of professional baseball to bring them under the *Federal Baseball* and *Toolson* decisions. But a necessary premise of this contention is that in *Federal Baseball* this Court based its decision, at least in part, on the nature of the reserve clause of the player contracts. We submit that this is not the case. The allegations and evidence of conspiracy to monopolize the baseball business were held not to show a violation of the Sherman Act upon the ground that the nature of the business was such that it did not come within the Act's scope. Accordingly, the Court did not reach or consider the legality of the means used in effectuating the alleged conspiracy. Not only was the reserve clause not mentioned in the opinion, but the Court significantly said at the outset that, "in the view that we take", it was "unnecessary" to set forth the "means" by which the defendants carried out their conspiracy. 259 U. S. at 207.

In the *Federal Baseball* case the Court, on the basis of the record in that case, considered that the only interstate aspects of baseball were those relating to the travel of players across state lines. The Court held that this transport was "a mere incident, not the essential thing", and that the "essential thing" was the game or "exhibition", which "although made for money would not be called trade or commerce in the commonly accepted use of those words" (p. 209).

Thus, in its very terms, the *Federal Baseball* decision was limited to the factual situation of baseball as it was conducted at that time and as it was described in the record before the Court. A finding applicable to baseball in 1922, that the only interstate aspects shown were not enough to treat it as an interstate business, is not equivalent to a general ruling of law which is binding in later cases involving other sports or businesses where the factual showings as to interstate commerce are more substantial. As Mr. Justice Holmes, the author of the *Federal Baseball* opinion, stated at the next term in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 "it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently."

Hence, on a proper application of *stare decisis,* the *Federal Baseball* case would be relevant here if the facts in this case, as in *Federal Baseball,* were simply that the defendants' only function was to provide travel arrangements to players, and that this was the sole interstate aspect of their business. But, as already shown, the interstate allegations in this case, as in the *International Boxing* and *Toolson* cases, are far more extensive. The holding in 1922 in the *Federal Baseball* case that the interstate phases of baseball, as the Court then understood it to be from the record, were not enough to make it an interstate business does not, therefore, in any way compel or justify the conclusion in 1956 that the interstate phases of football, as alleged in the pleadings in this case, are not enough to make it an interstate business.

In short, the decision that the interstate features of baseball in 1922 were "a mere incident" of a local business is not a controlling precedent that the interstate features of football in 1956 do not bring it within the Sherman Act. Cf. opinion of Judge Learned Hand in *Gardella* v. *Chandler,* 172 F. 2d 402, 408 (C. A. 2).

Accordingly, the doctrine of *stare decisis* requires a comparison not between "boxing or football or tennis, and baseball insofar as the conduct of the sport" [1] is concerned (i. e., how the game is played), but rather between the degree of interstate business activity found in *Federal Baseball* and that involved in the particular case under review. Evaluation of the nature and extent of interstate business activity necessarily calls for a factual inquiry into the particular circumstances, not a mechanical application of a so-called rule of law. The author of the *Federal Baseball* opinion stated elsewhere that interstate commerce "is not a technical legal conception, but a practical one, drawn from the course of business". *Swift and Company* v. *United States,* 196 U. S. 375, 398. It is a misconception, therefore, to regard the *Federal Baseball* case as laying down a rigid rule of law, applicable in defining the scope of the Sherman Act, that where there is an interstate chain of plainly commercial activities, they lose their character as such merely because they culminate in an athletic contest, which as a sport resembles baseball. That erroneous conception of the *Federal Baseball* case has been definitely rejected by this Court. *United States* v. *International Boxing*

[1] Frankfurter J., dissenting in *United States* v. *International Boxing Club,* 348 U. S. 236, 248.

Club, 348 U. S. 236, 241–243; *United States* v. *Shubert*, 348 U. S. 222, 230.

II

THE COURT BELOW ERRED IN HOLDING THE COMPLAINT DEFICIENT FOR FAILURE TO ALLEGE FACTS SHOWING THAT DEFENDANTS' CONDUCT WAS CALCULATED TO PREJUDICE THE PUBLIC INTEREST

The complaint is grounded on Sections 4 and 16 of the Clayton Act. Section 4, 15 U. S. C. 15, provides that any person "who shall be *injured* in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefor * * *, and shall recover threefold the damages by him sustained * * *" [emphasis added]. Section 16, 15 U. S. C. 26, provides in part that any person shall be entitled to injunctive relief "against threatened loss or damage by a violation of the antitrust laws". Thus all that need be shown is violation of the antitrust laws and injury caused thereby (or in a suit for an injunction, threat of such injury). We submit that the court below clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was "calculated to prejudice the public".

In determining whether particular conduct does or does not violate the antitrust laws, the effect of the conduct on trade and commerce may be a pertinent consideration. But this does not mean that in a suit based on violation of these laws, there is, in addition to the question of violation, a separate and independent issue as to injury to the public resulting from

the violation. Congress, when it outlawed certain conduct, made its own determination that the outlawed conduct was against the public interest. This Court has declared that the Sherman Act was enacted in order to suppress practices which had "become a matter of public concern" and "had come to be regarded as a special form of public injury". *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 493. The Act, the Court has said, "is its own measure of right and wrong" and "the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Manufacturing Co.* v. *United States,* 226 U. S. 20, 49.

The holding below that the petitioner had to show, in addition to violation of the antitrust laws, injurious effect on the general public, is to construe the laws as meaning that conduct which Congress has outlawed may nevertheless be condoned upon the basis of some vague "public interest" concept. No court has suggested that the statute permits any such defense when the Government, which is charged with the duty of enforcing these laws, is bringing civil or criminal proceedings against alleged violators. No reason has been advanced why the rule should be different in a suit by a private party for triple damages or for an injunction, as expressly authorized by statute. On the contrary, Congress when it provided in Section 5 of the Clayton Act, 15 U. S. C. 16, that the final judgment against the defendant in any Government suit under the antitrust laws shall be prima facie evidence of certain matters in any suit by a private party

brought against the defendant under these laws, intended "to minimize the burdens of litigation for injured private suitors." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568.

It is true that among the hundreds of cases under the antitrust laws decided by lower Federal courts it has occasionally been stated that in a triple damage action the plaintiff must show that the defendant's acts not only violated the antitrust laws but also injured the "general public" or the "public interest." We believe that such statements represent no more than a rather infelicitous way of equating antitrust violation with injury to the public interest. In any event, rulings or dicta of this kind are found in only a tiny minority of the decisions, and there has been no rational articulation of the basis for requiring a showing of injury to the public.

The complaint in the present case clearly alleges both that respondents violated the antitrust laws and that the petitioner was thereby injured (*supra*, pp. 2, 3). A valid cause of action was thus stated (cf., *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 188–189), assuming, as we have previously contended, that the business of professional football enjoys no general exemption from the Sherman Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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